

**Target, Inc. and American Federation of State,
County and Municipal Employees, Council 93,
AFL-CIO,¹ Petitioner. Case 1-RC-17485**

August 30, 1982

DECISION AND ORDER

**BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Carol Ann Sax of the National Labor Relations Board on November 12, 18, and 23 and December 2, 1981. Following the close of the hearing and pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, the Regional Director for Region 1 transferred this case to the Board for decision. Thereafter, the Employer filed a brief in support of its position.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board finds:

Target, Inc., the Employer, is a nonprofit Massachusetts corporation engaged in providing residential mental health care and vocational day care for adult mentally retarded individuals in Three Rivers and Palmer, Massachusetts. American Federation of State, County and Municipal Employees, Council 93, AFL-CIO, the Petitioner herein, seeks to represent certain of the Employer's employees.

The sole issue before us is whether the Board may properly assert jurisdiction over Target's operations. Target contends that the restrictive terms and conditions of its contractual relationship with the Commonwealth of Massachusetts preclude it from exercising any appreciable control over the working conditions of its employees, and that it therefore shares the Commonwealth's exemption from the Board's jurisdiction under Section 2(2) of the Act. Conversely, the Petitioner asserts that the Employer retains sufficient control over the working conditions of its employees to enable it to engage in meaningful bargaining with a labor organization. Resolution of the jurisdictional issue turns on application of the test articulated in *National Transportation Service, Inc.*² The Board there held

that the test for asserting jurisdiction over an employer which has ties with an exempt entity is whether the employer itself meets the definition of an employer within the meaning of Section 2(2) of the Act, and, if it does, whether the employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative.

Applying these principles to this case, we find the following:

Target was organized in 1977 as a private non-profit corporation for the purpose of providing rehabilitative counseling and training services to handicapped individuals in Palmer, Massachusetts. In 1979,³ Target won residential care and vocational day care contracts with the Commonwealth's Department of Mental Health (DMH herein). Under the residential contract, Target provides residential services to 11 mentally retarded adults who live in 5 apartments leased by Target in Palmer and Three Rivers, and staffed 24 hours per day by Target employees. Under the vocational day care contract Target provides direct care vocational services to 12 mentally retarded adults at its Three Rivers headquarters. Target has operated almost exclusively under these contracts, which are renegotiated annually. In fiscal year 1981, 98 percent of Target's total budget of \$262,914 was derived directly from the two DMH contracts. The remaining income was derived from Target's operation of a print shop and a plant store and from small private donations.

The two contracts are renegotiated annually and are administered pursuant to DMH's established procedures. Each annual negotiation commences with a DMH-imposed bottom line figure. Thereafter the total budget is allocated among specific line items set forth in DMH standardized contract forms. With regard to employee salaries and fringe benefits, DMH sets a dollar limit which Target is not allowed to exceed.⁴ The DMH-prescribed line item figures may also be subsequently adjusted downward by DMH. For example, in negotiating the 1981 residential contract, DMH initially informed Target that the maximum allocation for employee fringe benefits was 15 percent of their salaries. Thereafter, Target proposed the 15-percent maximum, but DMH refused to accept the contract until the figure was adjusted downward to 13.8 percent.

After local DMH officials and Target agree on the proposed budget, it is reviewed by the DMH

¹ The names of the Employer and the Petitioner appear as amended at the hearing.

² 240 NLRB 565 (1979).

³ The record does not reveal the Employer's activities of funding sources between 1977 and 1979.

⁴ As discussed below employee salaries are also limited by the terms of a consent decree.

area, regional, and central offices. After receiving DMH's final approval, the budget is forwarded to the Commonwealth's Rate Setting Commission and finally to the Comptroller's office. At any point along this chain of review the budget may be disapproved in whole or in part, requiring repetition of the entire process. Even after the budget has been approved by each office in the chain of review, it must be approved by the legislative and executive branches of the Commonwealth who may unilaterally reduce or terminate the funding of Target. Both contracts are expressly conditioned on the availability of appropriations.

Once the budget has been finally approved, Target must operate strictly within the established limits, and may not shift dollars among the line items midcontract unless a formal amendment is ratified by DMH and all the other agencies in the chain of review. Further, any unexpended line item funds revert to DMH on the expiration of the contract term.

The property used or leased by Target is likewise subject to DMH control. All purchases and leases are line items subject to the DMH-imposed ceilings, and Target has no authority to exceed the designated amount. Further, the title of any property purchased by Target with DMH contract funds which costs more than \$100 and has a useful life of more than 1 year vests with DMH. With regard to the apartments leased under the residential contract, DMH-site approval is required before rent negotiations begin, and Target consults with DMH concerning any rental increase.

In addition to the above, Target's contracts with DMH specifically require compliance with all the relevant terms of the *Brewster v. Dukakis* consent decree⁵ entered into by DMH in 1978. This decree mandates the systematic deinstitutionalization of mentally ill and retarded persons and to this end requires DMH to contract with direct care providers such as Target. In order to implement this plan, the consent decree delineates operating guidelines for direct care providers, including specific job descriptions, staffing and training requirements, program review standards, staff/client ratio, and staff salary schedules.

Target may accept as clients only those individuals referred to it by DMH, and may remove clients from programs only with DMH approval. Each client's treatment program is established in conjunction with DMH, is strictly monitored by DMH officials, and may not be modified without DMH approval. DMH closely monitors all aspects of Target's programs by requiring monthly written reports and notice of staff changes and by making

site visits and audits. Further, DMH requires Target to comply with DMH-determined staff orientation and training programs and staff licensing requirements. The Commonwealth's mental health regulations, which are incorporated by reference into Target's contracts with DMH, even specify the number of members on Target's board of directors, their geographic location, and their educational and experiential background, and preclude any director ownership interest in the program.

DMH is directly involved in setting the standards for hiring Target's employees. All Target staff vacancies must be posted pursuant to DMH procedures. Further, the DMH-Target contracts specifically require Target to give hiring preference to state employees who apply for a Target staff position so long as this policy of preference does not interfere with the DMH-imposed affirmative action requirements. Target's discretion in hiring is also limited by the minimum qualifications for each staff position set by DMH pursuant to the consent decree.

DMH's guidelines for investigations establish a procedure for a formal DMH investigation of "any complaint concerning allegations of actions or conditions posing or constituting a danger to the health or safety of a client or a violation of a client's rights." Under these guidelines, DMH is empowered to take whatever action it deems necessary, including staffing changes, and may fashion preventative measures including employee discipline and discharge. At the time of the hearing, DMH had in fact invoked this power and has conducted four investigations of Target employees. In the instance of a complaint filed against a Target employee in July 1981, the DMH official investigating the complaint initially ordered Target's program director, Thomas Coakley, to suspend the employee pending the investigation. Coakley complied with the investigation, but did not suspend the employee. Although the employee resigned prior to the completion of the investigation, the DMH investigator issued findings of fact and recommendations in which she recommended, in the language of a directive, that Coakley include an unsatisfactory performance evaluation in the employee's file, that the employee not be reinstated under any circumstances, and that the employee receive negative references if any were requested. Moreover, as a result of Coakley's failure to suspend the employee, the DMH area director sent Coakley a formal reprimand which stated that any further action of that type would not be tolerated, and that another occurrence would result in a request for Coakley's termination or cancellation of Target's contracts with DMH.

⁵ *Brewster v. Dukakis*, CA 76-4423-F (D.C. Mass. Dec. 7, 1978).

Based on the foregoing evidence, we conclude that the Commonwealth retains such substantial control over the wages, benefits, and other working conditions of Target's employees that Target cannot engage in meaningful collective bargaining with a labor organization with respect to such conditions. Target receives virtually all of its funds from DMH; the amount and specific use of those funds is controlled by DMH and other governmental entities; and any unexpended funds revert to the Commonwealth. The employees' salaries, benefits, job classifications, client/staff ratio, staff training, licensing, client selection, and client treatment are specified in Target's contract with DMH and in the consent decree to which Target is bound. In addition, DMH closely monitors all aspects of Target's operations, sets binding hiring guidelines, has the contractual authority to investigate complaints

filed against Target employees and to discipline them, and has in fact invoked this authority. Accordingly, we find that Target shares with the Commonwealth the exemption from Board jurisdiction under Section 2(2) of the Act.⁶ We, therefore, shall dismiss the petition.

ORDER

It is hereby ordered that the petition filed in Case 1-RC-17485 be, and it hereby is, dismissed.

⁶ Compare *Northampton Center for Children and Families, Inc.*, 257 NLRB 870 (1981), where the Board found that it had no jurisdiction over an employer similarly bound by DMH contract provisions and by the consent decree, with *The Mental Health Association of North Central Massachusetts, Inc., d/b/a Herbert Lipton Community Mental Health Center*, 258 NLRB 38 (1981), where the Board asserted jurisdiction over an employer which, although engaged in a partnership contractual relationship with DMH, retained independent authority to determine its employees wages and working conditions and was not subject to the consent decree.